International Union of Operating Engineers, Local 150, AFL–CIO *and* Jack Gray Transport, Inc. d/b/a Lakes & Rivers Transfer *and* International Longshoremen's Association, Local 1969, AFL–CIO. Case 25–CD–178156

October 21, 2016

DECISION AND DETERMINATION OF DISPUTE

BY CHAIRMAN PEARCE AND MEMBERS MISCIMARRA AND MCFERRAN

This is a jurisdictional dispute proceeding under Section 10(k) of the National Labor Relations Act (the Act). Jack Gray Transport, Inc. d/b/a Lakes & Rivers Transfer (the Employer) filed a charge on June 13, 2016, alleging that International Union of Operating Engineers, Local 150, AFL–CIO (Operating Engineers) violated Section 8(b)(4)(D) of the Act by threatening to engage in proscribed activity with an object of forcing the Employer to assign certain work to employees represented by Operating Engineers rather than to employees represented by International Longshoremen's Association, Local 1969, AFL–CIO (Longshoremen). A hearing was held on June 28, 2016, before Hearing Officer Derek A. Johnson. Thereafter, Operating Engineers and Longshoremen filed posthearing briefs.

The National Labor Relations Board affirms the hearing officer's rulings, finding them free from prejudicial error. On the entire record, the Board makes the following findings.

I. JURISDICTION

The parties stipulated that the Employer, an Indiana corporation, in the 12 months prior to June 28, 2016, performed services valued in excess of $50,000 in states other than Indiana; purchased and received at its Indiana facilities goods valued in excess of $50,000 directly from points outside of Indiana; and derived gross revenues in excess of $500,000 from conducting its business operations. The parties further stipulated, and we find, that the Employer is engaged in commerce within the meaning of Section 2(6) and (7) of the Act and that Operating Engineers and Longshoremen are labor organizations within the meaning of Section 2(5) of the Act.

II. THE DISPUTE

A. Background and Facts of the Dispute

The Employer is a stevedore company that loads and offloads ships and barges at the Port of Indiana in Portage, Indiana. The Employer is signatory to collective-bargaining agreements with both Operating Engineers and Longshoremen.

Historically, the Employer has assigned employees represented by Operating Engineers to operate Manitowoc lattice boom-crawler cranes (lattice cranes) to load and offload ships and barges, and has assigned employees represented by Longshoremen to operate all other equipment, including, but not limited to, ship-based cranes, payloaders, conveyors, fork lifts, front-end loaders, and bobcats.

The work in dispute is the operation of a hydraulic material handler. The Employer became interested in acquiring a material handler sometime in 2015. Instead of immediately purchasing a material handler, the Employer borrowed one from a customer. The Employer presented testimony that it plans to use the material handler to replace a lattice crane to load and offload barges in the event one of its two working lattice cranes is out of service. As of the date of the hearing, however, because of concerns over creating a jurisdictional dispute between Operating Engineers and Longshoremen, the Employer had not yet used the material handler to load or offload cargo but had only "exercised" it, once to move the material handler to a different area of the dock and once to move scrap material in the warehouse.

When the material handler was moved on or about April 7, 2016, a manager asked an employee represented by Operating Engineers to perform the work simply because the employee happened to be standing nearby. On April 14, 2016, Longshoremen filed a grievance claiming that the assignment violated its collective-bargaining agreement with the Employer. On May 12, 2016, in response to Longshoremen's pursuit of its grievance, Operating Engineers sent a letter to the Employer claiming the work and stating that Operating Engineers would "engage in any and all means, including picketing, to enforce and preserve its work assignment."

The Employer then filed an unfair labor practice charge, alleging that Operating Engineers' threat violated Section 8(b)(4)(D) of the Act.

B. Work in Dispute

The parties stipulated, and we find, that the work in dispute is the operation of any hydraulic material handler for the Employer at its Port of Indiana-Burns Harbor location.

C. Contentions of the Parties

The parties agree that there is reasonable cause to believe that Operating Engineers has violated Section 8(b)(4)(D) and that there is no voluntarily agreed-upon method to adjust the dispute that would bind all parties.

On the merits, Operating Engineers contends that the factors of collective-bargaining agreements, employer preference and past practice, area and industry practice, relative skills and training, and economy and efficiency of operations favor an award of work to employees represented by Operating Engineers. Longshoremen asserts that the factors of collective-bargaining agreements, employer past practice, area and industry practice, economy and efficiency of operations, and relative skills and training favor an award of work to the employees it represents. Longshoremen additionally contends an award of the disputed work to Operating Engineers would represent a significant loss of work for its approximately 50 active members, and only a minimal gain of work for the approximately 23,500 members of the Operating Engineers.

The Employer did not file a posthearing brief. However, at the hearing, the Employer's representative testified that the Employer prefers to assign the work in dispute to Operating Engineers based on its threat to strike and the fact that the material handler would be used to functionally replace or augment the lattice crane, which has historically been operated by Operating Engineers.

D. Applicability of the Statute

The Board may proceed with a determination of a dispute under Section 10(k) of the Act only if there is reasonable cause to believe that Section 8(b)(4)(D) has been violated. *Operating Engineers Local 150 (R&D Thiel)*, 345 NLRB 1137, 1139 (2005). This standard requires finding that there is reasonable cause to believe that there are competing claims to the disputed work and that a party has used proscribed means to enforce its claim to the work in dispute. Additionally, there must be a finding that the parties have not agreed on a method for the voluntary adjustment of the dispute. On this record, we find that these requirements have been met.

1. Competing claims for work

The parties stipulated, and we find, that Operating Engineers and Longshoremen both claim the work in dispute.

2. Use of proscribed means

The parties stipulated, and we find, that there is reasonable cause to believe that Operating Engineers used means proscribed by Section 8(b)(4)(D) to enforce its claim to the disputed work when, in its May 12, 2016 letter to the Employer, Operating Engineers stated that it would "engage in any and all means, including picketing, to enforce and preserve" its claim to the disputed work. The Board has long considered this type of threat to be a proscribed means of enforcing claims to disputed work. *Laborers Local 110 (U.S. Silica)*, 363 NLRB No. 42, slip op. at 3 (2015).

3. No voluntary method for adjustment of the dispute

The parties stipulated, and we find, that there is no agreed-upon mechanism for the voluntary resolution of this dispute.

Because we find that all three prerequisites for the Board's determination of a jurisdictional dispute are established, we find that this dispute is properly before the Board for resolution.

E. Merits of the Dispute

Section 10(k) requires the Board to make an affirmative award of disputed work after considering various factors. *NLRB v. Electrical Workers IBEW Local 1212 (Columbia Broadcasting)*, 364 U.S. 573, 577–579 (1961). The Board's determination in a jurisdictional dispute is "an act of judgment based on common sense and experience," reached by balancing the factors involved in a particular case. *Machinists Lodge 1743 (J. A. Jones Construction)*, 135 NLRB 1402, 1410–1411 (1962).

The following factors are relevant in making the determination of this dispute.

1. Certifications and collective-bargaining agreements

The parties stipulated that the Employer "is not failing to conform to an order or certification of the Board determining the bargaining representative for the employees performing the work in dispute."

Operating Engineers and Longshoremen are each party to a collective-bargaining agreement with the Employer. The Employer and Operating Engineers were parties to a collective-bargaining agreement which expired on May 31, 2016, after the dispute arose. Article I of the expired agreement stated that its terms were applicable to "the loading and unloading of ships, barges and vessels and all other crane work when such equipment is used on docks, piers, and in harbor areas handling cargo within the geographical jurisdiction of the Union and the operation and repair of all cranes and derricks and machines of a like nature regardless of motive power or type of mobility shall come within the occupational jurisdiction of the Union."[1]

[1] The Operating Engineers and the Employer negotiated a successor agreement in which the jurisdictional language was amended and a new classification and corresponding wage rate for a "material handler" was added. Because the new agreement was reached after the instant dispute arose, we do not consider it in making our determination herein. See *Carpenters Northeast Ohio Council Local 1929 (Luedtke Engineering)*, 307 NLRB 1323, 1325 (1992) ("[W]e look to the state of the Employer's contractual obligations at the time it made the assignment of work."); *Machinists Local 225 (Cessna Aircraft)*, 246 NLRB 24, 27 fn. 6 (1979).

The Employer and Longshoremen are parties to a current collective-bargaining agreement, which is effective from January 1, 2013, through December 31, 2017. Article 2 defines the bargaining unit as

> employees of the Company and/or Employer in stevedore, transit sheds, warehouses and yard operations such as Longshoremen, Warehousemen, Yard-workers, Light Power Equipment Operators, Checkers, Signalmen, Winch-men, Coopers, Light Pay-Loader Operators, Gearmen, Hatch Bosses, Mechanics, Apprentice Crane men, Crane Operators, Scrap-Crane Operator, Bulldozer Operators, Track-Mobile Operators, Walking Bosses, Heavy Pay-loader Operators, Conveyor Maintenance Operators, Container Machine Operators, Carpenters, Welders, Dispatcher, Ship Crane Operator, Linesmen, Tank Farm Operator, Hopper Operator, Hose men, Light and Heavy fork-lift Operators, Drivers, and Shuttle Truck Drivers (CDL) … who are employed by the Employer to work on wharves, bulkheads; quays, piers, docks and other berthing locations and adjacent storage or contiguous areas and structures associated with the primary movements of cargo or commodities from vessel to dock or dock to vessel, also including structures which are devoted to receiving, handling, holding, consolidation and loading or delivery of waterborne and other shipments, … including areas devoted to the maintenance of the terminal or equipment, and all work now being performed, and all work that has been historically and traditionally performed by the members of ILA Local 1969 . . . .

Although neither agreement specifically mentions the operation of a material handler, the language of both agreements is broad enough to cover the disputed work. Accordingly, this factor does not favor an award to either group of employees.

2. Employer preference

The factor of employer preference is generally entitled to substantial weight. See *Iron Workers Local 1 (Goebel Forming)*, 340 NLRB 1158, 1163 (2003). Bryan Ryberg, a contract consultant hired by the Employer to manage its stevedore operations at the Port of Indiana, testified that it was the Employer's preference to have Operating Engineers perform the disputed work, both "to avoid a strike" and because the material handler would be used to perform loading and offloading work that Operating Engineers–represented employees have historically performed using a lattice crane, in the event one of the Employer's lattice cranes is out of service.[2] Although the strike threat is accorded limited weight,[3] coupled with the Employer's preference based on the prior division of work, we find that this factor favors an award of the disputed work to employees represented by Operating Engineers.

3. Employer past practice

There is no Employer past practice with respect to the work in dispute because it involves new equipment that has not been used previously. As discussed above, however, Ryberg testified that the Employer plans to use the material handler to load and offload barges in the event one of the Employer's two working lattice cranes breaks down. Because the material handler will be used to functionally replace equipment that has historically been operated by Operating Engineers, this factor weighs in favor of awarding the work in dispute to employees represented by Operating Engineers. *Electrical Workers IBEW Local 3 (New York News, Inc.)*, 255 NLRB 320, 321 (1981); *Machinists Local 225 (Cessna Aircraft)*, 246 NLRB at 27.

4. Area and industry practice

Both Longshoremen and Operating Engineers operate material handlers for employers in the Port of Indiana and elsewhere. Operating Engineers–represented employees operate material handlers for Phoenix Services, Tube City IMS, Tri-River Docks, and Beemsterboer Slag Corporation, all in the Port of Indiana. Additionally, Operating Engineers–represented employees operate material handlers for employers at other locations in Indiana and Illinois.

Longshoremen employees operate a material handler for NLMK in the Port of Indiana. Longshoremen did not present specific evidence of other locations where its members operate material handlers. However, Longshoremen International Vice President Raymond Sierra testified that employers at ports across North America almost exclusively assign Longshoremen to operate any

[2] Ryberg testified that the Employer's preference to have Operating Engineers–represented employees perform the disputed work was based, in part, on the fact that "we were replacing a crane with a material handler." He testified further "we are taking a crane out of service and we are putting another piece of equipment into service. . . . [W]e have two cranes that we use to offload, and then we have a material handler to offload and load. So if we have a breakdown on one of the cranes, we have a material handler that we can go back to and utilize."

[3] The Board has long refused to accord much weight to a factor or preference that may not be representative of a free and unencumbered choice. See *Teamsters Local 158 (Holt Cargo)*, 293 NLRB 917, 921 (1989); *Int'l Longshoremen's Local No. 50* (*Brady-Hamilton Stevedore Co.),* 223 NLRB 1034, 1037 (1976), reconsideration granted and decision rescinded on other grounds 244 NLRB 275 (1979).

machinery, including material handlers, used to load and offload cargo from ships and barges.[4]

In view of the fact that both Operating Engineers–represented and Longshoremen-represented employees operate material handlers at the Port of Indiana and elsewhere, we find that the area and industry practice favors neither group of employees.

5. Economy and efficiency of operations

Longshoremen contends that this factor favors an award of the disputed work to employees it represents because there are more Longshoremen than Operating Engineers working for the Employer, and the Longshoremen are therefore better able to absorb the work. Additionally, Longshoremen contends that it utilizes a system where two employees work together, one as an operator and one as a signalman, both of whom are qualified operators. Hence, if the disputed work is awarded to Longshoremen-represented employees, the operator and signalman will be able to substitute for one another, eliminating the need for a relief operator.

Longshoremen and Operating Engineers both also contend that employees they represent can perform the disputed work more economically based on their respective contractual wage and benefit rates. However, the Board does not consider wage differentials as a basis for awarding disputed work. *Southwest Regional Council of Carpenters (Standard Drywall, Inc.)*, 346 NLRB 478, 483 (2006); *Painters Local 91 (Frank M. Burson, Inc.)*, 265 NLRB 1685, 1687 (1982).[5]

Considering the evidence, we find this factor favors an award of the disputed work to employees represented by Longshoremen. *Seafarers, United Industrial Workers of North America (Albin Stevedore Co.),* 182 NLRB 633, 637 (1970) (finding that economy and efficiency of operations favored award of work to union that has more members readily available to perform disputed work and who are qualified to substitute for one another).

6. Skills, safety, and training

Employees represented by both unions possess the skills necessary to perform the disputed work and they are experienced in doing so. Both unions also provide training to their members. Operating Engineers owns a training facility at which members can receive formal training in crane work and occupational safety, among other things. However, no evidence was presented that Operating Engineers provides specialized training for operating a material handler.

Longshoremen provides on-the-job training. Members who have seniority working on a certain machine and are considered "master at the top grade" train new employees. New employees must be trained and approved by a senior member before they can operate a machine. Longshoremen currently has eight members qualified to operate a material handler and four in training.

As employees represented by both unions possess the skills necessary to perform the disputed work and both offer some training, this factor does not favor employees represented by either Union.

Conclusion

After considering all of the relevant factors, we conclude that employees represented by Operating Engineers are entitled to perform the work in dispute. We reach this conclusion even though assigning the work to employees represented by Longshoremen would result in slightly greater economy and efficiency of operations. The Employer's preference and past practice of assigning loading and unloading work to Operating Engineers when performed with a lattice crane, which the material handler will functionally replace, however, conclusively favor assigning the work to employees represented by Operating Engineers. Such an assignment is not inconsistent with the area and industry practice or the Employer's collective-bargaining agreements either with Operating Engineers or Longshoremen. Nor is it clearly inconsistent with the agreement between the two Unions concerning the division of work. We emphasize, in this respect, that our award in this proceeding encompasses only the operation of the material handler when it is used to functionally replace a lattice crane. In making this determination, we award the work to employees represented by Operating Engineers, not to that labor organization or to its members.

DETERMINATION OF DISPUTE

The National Labor Relations Board makes the following Determination of Dispute.

Employees of Jack Gray Transport, Inc. d/b/a Lakes & Rivers Transfer who are represented by International Union of Operating Engineers, Local 150, AFL–CIO, are

[4] Sierra also testified that in 1984, a verbal interunion agreement was reached between Operating Engineers and Longshoremen pursuant to which Operating Engineers would operate lattice cranes to load and offload ships and barges at the Port of Indiana, and Longshoremen would operate all other machines for its signatory employers at the Port. Operating Engineers did not deny the existence of the agreement. However, Sierra's testimony regarding the agreement is vague and it is not clear that the agreement covers the disputed work, which involves the operation of machinery that was not in use at the time the agreement was reached.

[5] Operating Engineers also argues that Ryberg testified that it would be more economically efficient for the Employer to assign the work to employees represented by Operating Engineers. However, it appears from Ryberg's testimony that the Employer was primarily concerned with the economic loss it would incur if Operating Engineers engaged in a work stoppage.

entitled to operate any hydraulic material handler for the Employer at its Port of Indiana-Burns Harbor location when the material handler is used to functionally replace a lattice crane.

Dated, Washington, D.C. October 21, 2016

Mark Gaston Pearce, Chairman

Philip A. Miscimarra, Member

Lauren McFerran, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD